

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TEXARKANA DIVISION**

<b>HEALTH CHOICE GROUP, LLC and</b>	§	
<b>JAIME GREEN, on Behalf of the</b>	§	
<b>United States of America, et al.</b>	§	
	§	
<b>v.</b>	§	<b>Case No. 5:17-CV-126-RWS-CMC</b>
	§	
<b>BAYER CORPORATION, et al.</b>	§	

**ORDER ADOPTING REPORT AND RECOMMENDATION**  
**OF THE UNITED STATES MAGISTRATE JUDGE**

The above-entitled and numbered civil action was heretofore referred to United States Magistrate Judge Caroline M. Craven pursuant to 28 U.S.C. § 636. On June 29, 2018, the Magistrate Judge issued a Report and Recommendation, recommending Defendants’ Motion to Dismiss Plaintiffs’ First Amended Complaint (“FAC”) be granted in part and denied in part. Specifically, the Magistrate Judge recommended Defendants’ motion to dismiss Jaime Green’s claims be granted and Jaime Green be dismissed as a co-relator in this action; Defendants’ motion to dismiss under Rule 12(b)(6) be denied; and Defendants’ motion to dismiss under Rule 9(b) be granted to the extent Relators’ federal and state law FCA claims be dismissed without prejudice and Relator Health Choice Group be allowed to re-plead.

The Report of the Magistrate Judge which contains her proposed findings of fact and recommendations for the disposition of such action has been presented for consideration. No objections to the Report and Recommendation were filed. Thus, any aggrieved party is barred from *de novo* review by the district court of the proposed findings and recommendations of the Magistrate Judge.

There being no grounds of plain error or manifest injustice, the Court hereby adopts the Report of the United States Magistrate Judge as the findings and conclusions of this Court. The

Court finds co-relator Green's claims are barred by the False Claims Act's first-to-file rule. The Court denies Defendants' Rule 12(b)(6) motion to dismiss on limitations grounds and because the FAC fails to plead falsity, scienter, and causation.

While sufficient to satisfy Rule 12(b)(6), the Court agrees with the Magistrate Judge that the allegations in the FAC are not sufficient to satisfy the pleading requirements of FED. R. CIV. P. 9(b). The FAC's kickback schemes are not sufficiently supported by specific facts as to each defendant as required by Rule 9(b). Relators have not met their burden of "sufficiently pleading the time, place, or identity details of the traditional standard, in order to effectuate Rule 9(b)'s function of fair notice and protection from frivolous suits." *United States ex rel. Nunnally v. West Calcasieu Cameron Hosp.*, 519 Fed. Appx. 890, 895 (5th Cir. 2013). As held by the Magistrate Judge, the FAC also fails to plead factual information with sufficient indicia of reliability demonstrating a strong inference false claims were submitted to the Government. Thus, Counts 1 and 2 are dismissed without prejudice.

The Court further agrees with the Magistrate Judge that the FAC does not set forth facts alleging an agreement to conspire. There is not a factual basis to determine the roles of each defendant in any agreement or each defendant's specific intent to defraud. Thus, the Count 3 conspiracy claims are also dismissed without prejudice for failure to comply with the pleading requirements of Rule 9(b).

Finally, the state law claims are dismissed without prejudice for the same reasons. Like federal FCA claims, state law FCA claims are also subject to Rule 9(b). *See United States ex rel. Foster v. Bristol-Myers Squibb Co.*, 587 F. Supp. 2d 805, 827 (E.D. Tex. 2008).

Relator Health Choice Group is granted leave to reassert its claims to properly allege specific conduct by each defendant, as well as to plead with more specificity as required by Rule 9(b). *See United States ex rel. Bennett v. Medtronic, Inc.*, 747 F. Supp. 2d 745, 785 (S.D. Tex. 2010).

Accordingly, it is hereby

**ORDERED** that Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (Dkt. No. 38) is hereby **GRANTED IN PART and DENIED IN PART**. It is further

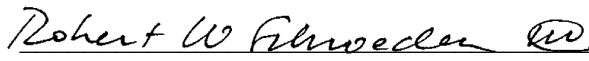
**ORDERED** Defendants' motion to dismiss Jaime Green's claims is granted, and Jaime Green is dismissed as a co-relator in this action. It is further

**ORDERED** Defendants' motion to dismiss under Rule 12(b)(6) is denied. It is further

**ORDERED** Defendants' motion to dismiss under Rule 9(b) is granted to the extent the federal and state law FCA claims are dismissed without prejudice and Relator Health Choice Group is allowed to re-plead its claims, to the extent it deems appropriate to address the deficiencies identified in the June 29, 2018 Report and Recommendation. It is further

**ORDERED** that Relator Health Choice Group shall re-plead its federal and state law FCA claims within **twenty (20) days** following the date of this Order Adopting, to the extent it deems appropriate. When and if Relator Health Choice Group files a Second Amended Complaint, it shall also attach a redlined copy as an exhibit.

**SIGNED this 31st day of July, 2018.**

  
ROBERT W. SCHROEDER III  
UNITED STATES DISTRICT JUDGE